IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1 OF 2006

Gammon India Limited. ... Petitioner.

vs.

The Municipal Corporation of Gr.Mumbai. ...Respondent

Mr.Janak Dwarkadas with Siraj Rustomji i/b. Subodh Kurdukar, for Petitioner.

Mr.R.D.Dhanuka with Mr.H.C.Pimpale & K.Y.Sirsekar, for Respondent.

AND

ARBITRATION PETITION NO.98 OF 2005

The Municipal Corporation of Gr.Mumbai. ...Petitioner

vs.

Gammon India Limited. ... Respondent.

Mr.R.D.Dhanuka with Mr.H.C.Pimpale & K.Y.Sirsekar, for Petitioner.

Mr.Janak Dwarkadas with Siraj Rustomji i/b. Subodh Kurdukar, for Respondent.

CORAM: D.K.DESHMUKH,J.

DATED: 21st March,, 2006

P.C.:-

1. The Arbitration petition no.1 of 2006 has been taken out by M/s.Gammon India Ltd. which is respondent in Arbitration Petition no.98 of 2005. The Arbitration petition no.98 of 2005 has been filed by the Municipal Corporation of Greater Mumbai challenging the validity of the Award made by the Arbitral Tribunal dated 15.9.2004 under Section 34(1) of the Arbitration and Conciliation Act,1996. The facts that are relevant and material for deciding these petitions are that the Corporation some time in the year 1998 invited tenders for the work of supply, installation, testing and commissioning of mechanical equipments at Bandra Sewage Pumping Station under BSDP from eligible bidders. The said bids could be submitted by the manufacturers or by suppliers not carrying out manufacturing activities. The Gammon India Ltd. submitted a tender. The contract was awarded to the Gammon India Ltd. Out of that contract, disputes arose between the parties. Those disputes were referred to the Arbitral Tribunal as per the terms of the contract. The principal dispute between the parties relates to reimbursement of sales tax, local taxes and Octroi to Gammon India Ltd. under the provisions of the contract. The Arbitral Tribunal by the Award has directed the Corporation to pay Gammon India Ltd. total amount of Rs.2,15,34,020/- towards

settlement in full of the claim presented before the Arbitral Forum against payment / reimbursement of sales taxes, local tax and Octroi with interest thereon. The Arbitral Tribunal has also directed Corporation to pay further interest.

2. Being aggrieved by that Award, the Corporation has filed the arbitration petition no.98 of 2005. When Arbitration Petition no.98 of 2005 was argued before me the Corporation contended that the Gammon India Limited had submitted Attachment No.10 with the bid form in which the Gammon India Ltd. had confirmed that no sales-tax in any form was payable by the Corporation on the bought-out items. The Corporation contended that the Gammon India Ltd. could not have made such claim in view of confirmation in the Attachment and that although this issue was raised before the Arbitratal Tribunal by the Corporation, it has been ignored and has not been dealt with by the Arbitral Tribunal. It was further submitted on behalf of the Corporation that the Gammon India Limited had inserted and later on withdrawn the clause no.16 in the bid form which stated that the Corporation should reimburse the Gammon India Ltd. with the actual sales tax paid by it against documentary evidence of payment. The Corporation contended that the claim of Gammon India Ltd. was not maintainable in view of this action of the Gammon India Ltd. and the Arbitral Tribunal has failed to consider or appreciate this position. At

that stage, the arbitration petition no.1 of 2006 was filed by the Gammon India Ltd. under sub-section (4) of Section 34 of the Arbitration and Conciliation Act,1996 contending that in view of the above submission made on behalf of the Corporation it would be appropriate as also in the interest of justice to exercise power under sub-section (4) of Section 34 of the Arbitration and Conciliation Act and to adjourn the hearing of Arbitration Petition no.98 of 2005 to give the Arbitral Tribunal an opportunity to take such action which may eliminate the aforesaid ground for setting aside the Award i.e. to give finding with regard to the contentions raised by the Corporation that the claim of Gammon India Ltd. was not maintainable in view of the prohibition in the Attachment to the Bid form, as also to be specific, the finding with regard to the contention of the Corporation that the claim of Gammon India Ltd. was not maintainable in view of the insertion and then withdrawal of clause 16 in the bid form by the Gammon India Ltd. The Corporation opposed the application filed under Section 34(4) of the Act on behalf of Gammon India Ltd.. Firstly, it is submitted on behalf of the Corporation that the recourse to the provisions of sub-section (4) of Section 34 of the Act cannot be taken where the ground raised before the learned Arbitral tribunal was not considered by the learned Arbitral Tribunal, and recourse to the provisions of Section 34(4) of the Act can be taken only to eliminate the ground for setting aside the Award. In the present case, consideration

of the grounds raised by the Corporation which have not been considered by the Arbitral Tribunal may result in review of the Award by the Arbitral Tribunal which it has no power to do. It is further submitted that as the claim made by the Gammon India Ltd. itself was not maintainable and therefore, the Award could not have been made by the Arbitral Tribunal.

3. The learned Counsel appearing for Gammon India Ltd., referring to the provisions of Section 34(4) of the Act, submits that the Arbitration and Conciliation Act is based on the UNCITRAL Model Law on International Arbitration. The learned counsel also refers to the UNCITRAL Report on the Adoption of the Model Law and submits that sub-section (4) of Section 34 of the Arbitration and Conciliation Act,1996 clearly contemplates the common law remedy of remission to the arbitral Tribunal for reconsideration of matters and is not restricted to rectification of minor procedural defects. According to the learned Counsel such a remission necessarily contemplates reconsideration or pronouncement upon matters not considered or pronounced upon. According to Section 34(4) of the Act, the Arbitral Tribunal can take such action as, in its opinion, will eliminate the grounds of setting aside the Award, the provision expressly contemplates the Arbitral Tribunal resuming the arbitral proceedings. It is submitted that it is clear from the report referred to above that the proposal that the provision should be restricted to defects which were

remediable without reopening the proceedings was not accepted by the UNCITRAL. Therefore, it may be possible that on a resumption of such proceedings, the Arbitral Tribunal may arrive at a different conclusion. It is further submitted that the provision has been widely worded with a view to provide the Court and the Arbitral Tribunal sufficient flexibility to meet the needs of a particular case. Wide latitude is therefore, given to the Court in passing orders under the sub-section. It is further submitted that the provision is in keeping with the general philosophy underlying the UNCITRAL Model Law and the said Act, of attempting to uphold the integrity of the award of the Arbitral Tribunal and of the procedure of setting aside the Award being a last resort to be adopted in cases where the Court is left with no other option. It is further submitted that the historical evolution of the statutory power of remission is to be found in paragraph 7, page 190 of the judgment of the Kerala High Court in the case of State of Kerala vs. V.P.Jolly AIR 1992 Kerala 187. The relevant portion is extracted as under:-

> "Historically, before 1854, the position in England was that High Court controlled the arbitrators by use of writ of certiorari. The Court either quashed the award and sent the parties to square – one or it did nothing. The only exception was where the parties had incorporated a 'Richard Clause' – named after its author, Mr.Richards, the

> 'average stater' – which could empower the court to remit any matter instead of setting aside the entire award. However, the statute soon filled the gap permitting statutory remission for reconsideration when Section 8 of the Common Law Procedure was enacted and that was replaced by Section 10 of the English Arbitration Act,1889 and then by Section 22 of the 1950 Act..."

It is further submitted that the power of the Arbitrators under section 34(4) of the Act is similar to the power of the Court to remit the award under Section 16 of the 1940's Act. It is therefore, claimed that it would be open to the Arbitrators to reconsider the matter, in the event of Court exercises its power under section 34(4) of the Act, by adjourning the petition filed to challenge the award, in order to give the arbitral Tribunal an opportunity to resume the proceedings so as to eliminate the grounds for setting aside the Award. Therefore, the submissions of the respondent that it would amount to the Arbitral Tribunal reviewing their Award is untenable. The learned Counsel also referred to the provisions of Section 34(4) of the Act and submitted that one more reason as to why the Respondents contention that the power under Section 34(4) does not entitle the arbitrators to reconsider the award – in other words, to change the conclusion, - is misplaced, is because it is contrary to the very meaning, object, and purpose of "remission" of a matter to the arbitrators. This is made clear from para 6 page 553 of

the law as laid down in Rikhabdass V/s. Ballabhdas and from para 10 page 845 of the decision in Ashok Kshyap Vs. Sudha Vasisht, wherein the Supreme Court has clearly indicated that a reconsideration of an award under Section 16 of the 1940 Act necessarily imports a fresh consideration of the matters already considered by them. It is further submitted that another reason why the Respondents contention that the power under Section 34(4) does not enable the arbitrators to reconsider their decision and/or to change their decision is misplaced is because Section 34(4) permits the Arbitral Tribunal to; “eliminate the grounds for setting aside the arbitral award.” If the Respondent's contention were to be accepted, it would mean that this power could only be exercised in cases where the decision would not and cannot be altered. It would also mean that in cases where – for instance – the principles of natural justice were not followed and the arbitral proceedings resumed pursuant to an order under Section 34(4), the arbitrators would not be entitled to change their decisions even if the facts so warranted. It would also mean that whereas the grounds on which the decision/award is rendered may be altered - the decision/award cannot be altered even though the altered grounds/reasons may not carry with the decision- an absurd proposition. It is further submitted that since under the present Arbitration Act there is no power in the Court similar to the power under Section 19 of the 1940 Act, where, after it has set aside the award,

to supersede the reference and order that the arbitration agreement shall cease to have effect. It would only mean that where an award is set aside under the said Act, the proceedings would have to be started de-novo before the arbitrators. Section 34(4) of the Act seeks to avoid such a situation by permitting the arbitrators to resume the proceedings in order that the grounds for setting aside the arbitral award, if possible, are eliminated – similar to a remission order under Section 16(c) of the 1940 Act. The learned Counsel relying on the judgment of the Division Bench in the case "Harinarayan Bajaj V. Rajesh Meghani, 2004(3) Bom CR 165," submits that the decision of exercise of power under Section 34(4) of the Act, in a case where the Arbitrator has not considered the defence which has been raised, has been upheld by the Division Bench and therefore, in the present case this Court can make order under Section 34(4) of the Act.

3. On the other hand the learned Counsel appearing for the Corporation submits that the order under Section 34(4) of the Act can be made only where the Arbitral Tribunal can resume the proceedings to eliminate the ground for setting aside the Arbitral Award. Where the Arbitral Tribunal has omitted from consideration the defence raised by the other side, recourse of provisions of Sub-section (4) of Section 34 of the Act cannot be taken because it is possible that after considering that point the Arbitral Tribunal may come to a different conclusion.

4. Now in order to appreciate the rival submissions, it is necessary to refer to Sub-section (4) of Section 34 of the Act, which reads as under:-

> "34. Application for setting aside arbitral award.
>
> (4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

Perusal of the above provision shows that the Court can exercise its power under sub-section (4) of Section 34 of the Act only on an application made by a party and when the Court considers it appropriate. What is to be considered by the Court is whether it will be appropriate for it to adjourn the proceedings for a period of time to give Arbitral Tribunal an opportunity to resume the arbitral proceedings. In my opinion, therefore, when one of the grounds, on

which the Award made by the Arbitral Tribunal is challenged before the Court, is that the defence which was raised by the other side before the Arbitral tribunal which goes to the root of the matter, has not been considered by the Arbitral Tribunal and the Court finds that the defence which has been omitted from consideration goes to the root of the matter and therefore, non-consideration of that defence results in non application of mind to the relevant and material aspect of the matter and therefore, the Award violates the principles of natural justice and therefore, the Award is liable to be set aside on that ground alone, the Court would be justified in adjourning the proceedings so that the Arbitral Tribunal can take that defence into consideration. Because if the Arbitral Tribunal considers that defence and records its finding, then the Award cannot be set aside by the Court on the ground that the relevant and material defence raised by the party has not been considered by the Arbitral Tribunal. Therefore, in such a situation when the Court adjourns the proceedings to enable the Arbitral Tribunal to consider the defence which it has omitted to consider, what it really does is that the Court makes an attempt to eliminate the ground on which the Award can be set aside. Now when the matter goes to the Arbitral Tribunal what steps can be taken by the Arbitral Tribunal is to be considered by the Arbitral Tribunal in the light of the provisions of sub-section (4) of Section 34 of the Act. Perusal of sub-section (4) of Section 34 of the Act shows that in such a situation the

Arbitral Tribunal may take such steps as may be necessary to eliminate the ground for setting aside the Arbitral Award. In the present situation, this will mean that the Arbitral Tribunal will have to consider the defence which it had omitted to consider and thereby eliminate the ground i.e. non consideration of valid defence by the Arbitral Tribunal for which the Court may set aside the Award. In my opinion, merely because the consideration of that defence may results in arbitral tribunal coming to the conclusion that the Award itself could not have been made, will not result in the denying the power to the Court to adjourn the proceedings. Because it is also possible that even after considering the defence, the Arbitral Tribunal may not disturb the Award and may on the contrary confirm it. In a given case, it is also possible that the Arbitral Tribunal may come to the conclusion that considering the defence raised, the Award itself chould not have been made. The question, whether in that situation, the Arbitral Tribunal itself would be competent to set aside the Award or it will have to send its conclusion to the Court before which the petition is pending, leaving it to the Court to consider its finding, is not necessary to be considered by me at this stage as the question has not yet arisen and it is possible that may not arise in this case. In my opinion, a reference to the provisions of Sub-section (4) and (5) of Section 33 of the Act is also relevant. Sub-section (4) and (5) of Section 33 of the Act read as under:-

> “33. Correction and interpretation of award; additional award.
>
> (4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.
>
> (5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request. “

Perusal of the above provisions shows that after the Award is made, on an application made by a party the Arbitral Tribunal finds that the claim was actually made before it but it omitted to consider that claim, the Arbitral Tribunal can resume the proceedings and consider that claim and make additional Award. In my opinion, if a claim actually made before the Arbitral Tribunal which has been inadvertently or otherwise omitted by the Arbitral Tribunal from consideration, can be taken into consideration by the Arbitral Tribunal after the Award is made, there is no reason why a defence raised but omitted from

consideration can not be considered by the Arbitral Tribunal after Award is made. If the Tribunal cannot consider a defence which is omitted from consideration under Section 33 (4) and (5) then in my opinion, it would be in the interest of justice to so read the provision of Section 34 of the Act that the Tribunal can consider the defence omitted from consideration after the award is made, such an interpretation would advance remedy. In any case following of such course of action will not be contrary to the mandate of sub-section (4) of Section 34 of the Act because following of such course of action is necessary to eliminate the ground viz. non consideration of defence by the Arbitral Tribunal for setting aside the Award.

6. In the present case, I am considering the specific case of omission of the Arbitral Tribunal to consider a relevant and material defence raised before it therefore, I do not propose to consider the larger controversy which was argued before me that whether the power of the Arbitral Tribunal contained in sub-section (4) of Section 34 of the Act is a power to reconsider the entire Award, and whether the power of the Court under sub-section (4) of Section 34 of the Act is a power to order remission of the Award. For the purpose of deciding this petition, it is not necessary for me to consider those general and larger questions. I also find some substance in the submission made on behalf of the learned Counsel appearing for Respondent that in the

case of “Harinarayan G.Bajaj Vs. Rajesh Meghani and another, 2004(3) Bom. C.R. 165” the power under section 34(4) of the Act was exercised by the Court so as to enable the Arbitral Tribunal to consider the defence which was raised by a party and which was omitted from consideration by the tribunal. While confirming that order the Division Bench has observed thus in paragraph 11:-

> “11. The learned Single Judge came to the conclusion that an important defence which had been urged on behalf of the applicant in response to the claim in arbitration had not been dealt with by the Arbitral Tribunal. The contention of the appellant was that there can be no direction to the appellant to pay the price of the shares unless the first respondent was in a position to effect delivery and since the first respondent was not in a position to deliver the shares, the appellant could not be held liable for the payment of the purchase price. The view of the learned Single Judge that the defence which had been raised was not duly considered was unexceptionable. So was the view that in such a case under the provisions of Section 34(4), the Court was empowered to adjourn the proceedings to allow the Arbitral Tribunal to resume the proceedings or

> to take other action as in the opinion of the Arbitral Tribunal would eliminate the ground for setting aside the arbitral award. On the finding of the learned Single Judge that a defence which had been raised by the appellant was not considered by the Tribunal, it was only appropriate and proper that the proceedings before the Court be adjourned so as to enable the Arbitral Tribunal to consider the defence and to arrive at its finding thereon. That would obviate a challenge to the validity of the award on the ground that a submission urged before the Arbitral Tribunal was not considered."

Thus, it appears that the Division Bench has confirmed the order of Single Judge where the power under Sub-section (4) of Section 34 of the Act was exercised to enable the Arbitral Tribunal to resume the proceedings for consideration of defence which was raised before the Arbitral Tribunal but was not considered by it. The learned Counsel appearing for the Corporation relied on the judgment of the Division Bench of this Court dated 26.10.2005 in the case "Darmilla Fashions Pvt. Ltd. Vs. Prasad A. Jog" in the Appeal no.954 of 2005 in Arbitration Petition no.88 of 2005, to contend that while making order under Section 34(4) of the Act this Court cannot give any direction to the

Arbitral Tribunal. I do not propose to give any direction to the Arbitral tribunal. I have recorded my observation that it is an admitted position between the parties before me that two grounds mentioned above which were raised in the defence by the Corporation have admittedly not been considered by the Arbitral Tribunal and therefore, it was urged before me on behalf of the Corporation that I should set aside the Award on the ground that those relevant grounds were not considered by the Arbitral Tribunal. However, I consider it appropriate to adjourn those proceedings for a period of Twelve weeks to enable the Arbitral Tribunal to resume the proceedings and to proceed with the matter in accordance with Law. It is clarified that the Corporation has challenged the Award on several other grounds also, but in view of the petition filed on behalf of the Gammon India Ltd. I did not hear the Corporation on other grounds. Therefore, in case if it becomes necessary, as the petition no.98 of 2005 itself is pending, those grounds can be urged by the Corporation. The petition no.1 of 2006 is disposed of.